FILED
SEP 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 296

UNITED STATES OF AMERICA,
Petitioner

v.

UNION TRUST COMPANY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNION TRUST COMPANY, ET AL. IN OPPOSITION

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

Citations

Cases:

	PAGE
Dalehite v. *United States*, 346 U.S. 15..	1, 3, 8, 9, 10, 11
Gardner v. *Panama R. R.*, 342 U.S. 29	5
Indian Towing Company v. *United States*, No. 213, Oct. T. 1954	1, 3, 4, 7, 8, 11
Johnston v. *District of Columbia*, 118 U.S. 19 (1886)	9
Mobile v. *Lartigue*, 23 Ala. App. 479, 127 So. 257 (1930)	6
Rhodes v. *Asheville*, 230 N.C. 134, 52 S.E. 2d 371 (1949)	6
United States v. *Lawter*, 219 F. 2d 559 (1955)	7
United States v. *White*, 211 F.2d 79, 82 (C.C.A. 9, 1954)	10
Worley v. *United States*, 119 F. Supp. 719, 721 (D. Or., 1952)	9

Statutes and Regulations:

28 U.S.C.:	
1346(b)	2, 11
2680(a)	1, 10
49 U.S.C.:	
452(d)(1)	5
14 C.F.R.:	
61.71 et seq.	11
61.110	11
61.134	11
61.191 et seq.	11

Miscellaneous:

31 A.L.R. 1307 (Anno.)	5
83 A.L.R. 350 (Anno.)	6
99 A.L.R. 250 (Anno.)	6
138 A.L.R. 126 (Anno.)	6
16 A.L.R. 2d 1083 (Anno.)	6

PAGE

C.A.A. report on "Economic Aspects of Airport-Traffic Control Towers," Hearings before House Subcommittee of The Comm. on Appropriations, (80th Cong., 2nd Sess.) on the Dept. of Commerce Approp. Bill for 1949, at pp. 228-230 5

C.A.A. *Statistical Handbook of Civil Aviation* (G.P.O., 1948), p. 19 4

100 Cong. Rec. 5983 (May 11, 1954) 6

Digest of Airways Operations Service (G.P.O., 1948) Vol. I, pp. 23-25 4

66 Harv. L. Rev. 488, 490 (1953) 10

McQuillin, *Municipal Corporations* (3d ed.) Vol. 18
§53.90-53.116 5
§53.96 6

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The United States has filed a petition for a writ of certiorari to review the decision below on the grounds: (1) that this case presents questions of far reaching importance parallel to those now pending before this Court in *Indian Towing Company* v. *United States,* No. 213, Oct. T. 1954; (2) that like *Indian Towing* this case involves the question whether under *Dalehite* v. *United States,* 346 U.S. 15, the Government is liable for injuries caused by the negligent malfunctioning of a federally operated warning system designed to protect those engaged in commerce, and; (3) that unlike *Indian Towing* this case involves the further question whether C.A.A. control tower operators perform a "discretionary function or duty" excluded under Section 2680 (a) of the Federal Tort Claims Act.

The United States has also filed a memorandum in No. 297 stating that if its petition in No. 296 is granted it does not oppose the granting of the petition of Union Trust Company, et al., in No. 297 involving the question whether, as to interstate torts, the Act alters the established conflict of laws rule applying the law of the place where the accident occurs rather than of the place where the negligent actor stood. However, the Government's memorandum goes on to assert that that question is not of certiorari stature because: (1) it has not *yet* arisen in a sufficient number of cases to indicate it will be of widespread importance, and; (2) in any event, the express statutory language supports the decision below even though there is a noticeable absence of any expression of legislative intent or purpose [1] to alter the established conflicts rule in the way the court below held Congress had done in enacting 28 U.S.C. 1346 (b).

For reasons already stated in our petition in No. 297, we firmly believe that petition should be granted without regard to this Court's action on the Government's petition in No. 296. The pusillanimous "opposition" so indicates. The question raised in No. 297 has now arisen and the orderly administration of justice ought not to await a flood of lower court indecision which can be avoided by this Court's action now. And, insofar as the merits are concerned, it is no answer to say, as the Government has in effect said, that the established conflicts rule was altered by the "precise language" of the statute no matter how unwittingly, how unintentionally or how void of reason.

Regardless of action taken in No. 297, there is no question raised in No. 296 justifying certiorari. Seeking to

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[1] The Government cannot even point to any published or unpublished expression of the draftsman (the Department of Justice) indicating any reason for or intent to alter the established conflicts rule.

equate this case to *Indian Towing*, the petition frames an issue claimed to involve a so-called "government function" and it asserts that the question involved is whether the Government is liable under the Act by reason of the "negligent failure to accomplish a uniquely governmental objective—protecting and safeguarding those engaged in commerce" (Pet. in No. 296 at p. 18). However, for the reasons carefully spelled out by both courts below, no such question is really involved and the decision below is plainly consistent with the decision in *Dalehite*. The opinion below clearly, unanimously and convincingly demonstrates that whatever the legitimacy or scope of the alleged implicit exception for negligence arising from the performance of a "governmental function," the activities of control tower operators are not of that character. And for that reason, there is in fact no parallel between this case and *Indian Towing* and, therefore, no reason for this Court's consideration on certiorari.

Due to lack of an opinion in the trial court and the per curiam opinions in the Fifth Circuit and here, the judicial reasoning in *Indian Towing* cannot be determined. However, the Government's brief filed on the original hearing here is informative. After detailing the history of lighthouse operations (Brief pp. 11-16), the brief concludes (at pp. 38-39):

> "As we have already shown, the construction, maintenance and operation of lighthouses and of other general navigational aids are functions which, from the earliest days of our country, have been performed by the Federal Government . . . More than that, for almost half a century, Congress has expressly prohibited any private person or other public body from undertaking this function except for very limited private purposes (*supra*, fn. 8 at p. 14). Where the activity which itself causes the damage is peculiarly governmental and prohibited to private persons, it is especially difficult to perceive how there can be any

analogous liability of a private person in like circumstances."

The operation of control towers at airfields is vastly different, both historically and functionally. As the court below pointed out—although the Government here seeks to sugar-coat the facts—the operation of control towers has not been and is not now uniquely governmental. Between 1926 and 1941 (inclusive) the federal government did not operate a single airport control tower, although it did operate other air facilities such as radio range stations and radio beacons. C.A.A. *Statistical Handbook of Civil Aviation* (G.P.O. 1948), p. 19. By 1939, after the Civil Aeronautics Act had already become law, there were 52 towers being operated non-federally by cities (apart from how many may have been operated by private concerns). *Digest of Airways Operations Service* (G.P.O., 1948) Vol. I, pp. 23-25. And even when the accident in question occurred in 1949, 35 towers were operated by others than the federal government. U. S. Pet. in No. 296, fn. 4, p. 6.

Thus, on the facts there is nothing uniquely governmental in the operation of airport control towers so that, in contrast to *Indian Towing,* one need not search for private parallel to the activity out of which governmental tort responsibility was established below. Certainly during the fifteen year period 1926-1941 when *all* control towers were non-federal, liability for their negligent operation could not have been defeated by the present argument that tower operation is "characteristically governmental." And nowhere in the Government's petition or its briefs below do we find any suggestion that the basic functions of control towers were altered when the Government began operating them. Accordingly, the mere shift from private or local operation of control towers to federal operation (whether direct or supervised) would not, *per se,* make those operations uniquely or char-

acteristically governmental. That this shift does not alter the nature of the function performed from private to public is further evident, for example, in the liability of municipalities for negligent (and exclusive) operation of gasworks, light and power plants, waterworks, street railways, subways and other public utilities and facilities including airports.[2]

Legislative materials relating to Federal training of control tower operators and the staffing of major towers by C.A.A. personnel plainly show that it was recognized that control tower activities were essentially local in purpose, effect and benefit, but that the Federal Government granted its aid because local governments and private interests were financially unable to support these safety progams.[3] Insofar as the Federal Government operates local control towers, it is in the nature of a grant-in-aid program such as is common in education, public health and roads, which does not convert the activity thus aided from local to uniquely or characteristically Federal. The arrangement stems from the desire for standardized and efficient air control and local solicitation for such aid,

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[2] See, e.g., McQuillin, *Municipal Corporations* (3d ed.) Vol. 18, §§ 53.90-53.116; Annotation 31 A.L.R. 1307. If the situation were otherwise, were the Government, as in war or strikes, to take over all the railroads, it could argue that tort liability for such activities was eliminated because of the elimination of private operators. But in *Gardner* v. *Panama R.R.*, 342 U.S. 29, decided prior to an amendment of the Tort Claims Act to cover the specific situation, the Government was held liable for operational accidents occurring during its take over.

[3] 49 U.S.C. §452 (d) (1) provides in part that "The Administrator is authorized . . . to train *civilian* and Governmental air-traffic control tower operators or to conduct programs for such training . . ." (Emphasis supplied). See also C.A.A. report on "Economic Aspects of Airport-Traffic Control Towers," Hearings before House Subcommittee of The Comm. on Appropriations, (80th Cong., 2nd Sess.) on the Dept. of Commerce Approp. Bill for 1949, at pp. 228-230.

not from any Federal compulsion.[4] Consequently, C.A.A. tower control personnel at an ordinary municipal airport, for example, perform services as an integral part of the airport operation for which the municipality would be liable.[5] The utilization of Federal lent servants does not alter the function performed nor the duty owed by the airport operator to the public invited to use the airport.

Thus, whatever might be said with respect to Government liability were this a case—which it is not—where liability was predicated upon its omission to act in establishing or maintaining control towers, once it has affirmatively taken over this mission and established a control

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[4] The Government has noted that it does not have a mandatory duty to maintain all control towers which, in leaving the field open to others, is hardly consonant with the notion that the activity is characteristically governmental.

[5] "The overwhelming weight of authority is to the effect that the construction, operation and maintenance of an airport by a municipality is a proprietary function and that such municipality may be held liable in tort for the negligent operation thereof." *Rhodes* v. *Asheville*, 230 N.C. 134, 52 S.E. 2d 371 (1949). To the same effect, see McQuillin, *Municipal Corporations* (3d ed.) §53.96, and Annotations 16 A.L.R. 2d 1083, 83 A.L.R. 350, 99 A.L.R. 183, 138 A.L.R. 126. Operation by a city of an airport is a proprietary function although operations prove financially unprofitable because *"an airport . . . is essentially a part of the city's transportation system . . . an airport is a true analogy to a railroad station or a bus terminal."* *Mobile* v. *Lartigue*, 23 Ala. App. 479, 127 So. 257 (1930) (Emphasis supplied).

The operation of Washington National Airport, the only civil airport owned by the United States, is of the same character. It is a business enterprise purely and simply and has been so consistently recognized by the Federal Government. See, e.g., letter of May 6, 1954 from Secretary of Commerce recommending enactment of bill to incorporate the airport based on the finding by the (Hoover) Commission on Organization of the Executive Branch of the Government that it is a "straight-line business enterprise" producing a substantial income. 100 Cong. Rec. 5983 (May 11, 1954), relating to introduction of S. 3435.

tower in lieu of a private tower, it is obliged not to injure the users of the particular airfield by the negligent performance of the control tower activity which it has undertaken. Paraphrase from *United States* v. *Lawter*, 219 F. 2d 559 (1955), where the Fifth Circuit, distinguishing its decision in *Indian Towing*, held the Government liable for a death negligently caused by the Coast Guard in a helicopter rescue mission.[6]

The guise of an activity uniquely or characteristically governmental is sought to be supplied by the petition's emphasis that "The control tower is the nub of CAA's extensive network of regulation and control of air traffic" (p. 25). But even assuming that efficient regulation of air traffic requires control towers, it does not follow that the activity thus becomes characteristically governmental. Non-federal control towers have operated and do operate so that their inherent or characteristic functions cannot be said to be federal even though the part they play, the lack of non-federal funds to maintain them and efficiency of centralized operation, indicates the practical wisdom of federal intervention. Indeed in a parallel field of activity, the railroads, federal regulation is intensive but control facilities such as signal and switching towers—designed and required as part of a federal program to safeguard those engaged in commerce—are left to private operation and responsibility.

As a practical matter, whatever might be said of enroute air navigational facilities and aids, the control tower is not the nub of the regulatory system nor an indispensable part of the control of air commerce. Many airfields operate without such towers and, as the petition itself shows, the need for a tower at a particular airfield becomes more significant only as traffic at that field increases. In other words, the control tower is the nub of and an integral

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[6] The Government did not petition for certiorari in *Lawter*.

part of local airport operation to move traffic in and out of a particular airport and as such is part of an activity (airport operation) which, except for Washington National Airport, is completely non-federal in operation.

In short, there is nothing uniquely or characteristically governmental about control tower services whether analyzed from the standpoint of who performs the services or what the nature of the services is.

Having disposed of the effort to equate this case to *Indian Towing* as an excuse for invoking certiorari, we turn to the claim that a "discretionary function or duty" is involved. At the outset, it is significant that the petition does not assert that in this regard any new or unique problem is raised not already disposed of in *Dalehite*. All the petition suggests as a basis for certiorari is (1) that the court below misread *Dalehite* as creating a magic formula for evaluating activities as discretionary or non-discretionary depending upon whether they are at the "policy level," and (2) that consequently the court below decided this case erroneously because of its application of that unsound mechanized approach to the discretionary function immunized by the statute. We do not so read the opinion below. Indeed, that opinion, like *Dalehite*, reveals that the determination whether an act involves executive discretion in the traditional and legislative sense requires an analysis of all the facets of the activity of which the "level" at which the decision is made is only one. We submit that the Government's effort to read the decision otherwise is transparently no more than an effort to "create" a question so as to seek review on certiorari.

On the merits, the issue raised by the Government's reliance upon the "discretionary function" exception is more imaginary than real. It relies more upon semantics than upon the informative legislative and judicial history of the provision. While the limits of language do not permit

of an all-embracing definition of a "discretionary function or duty" not susceptible to labored arguments of construction or application, nevertheless there is no doubt that the activities of airport control tower operators do not fall within its ambit.

As the court below stated (U.S. 34a), citing *Johnston* v. *District of Columbia,* 118 U.S. 19 (1886), the Government overlooks the distinction between "non-actionable planning and actionable negligence"; "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

Plaintiffs have not challenged the adoption of federal plans for the regulation of air commerce or the installation or overall regulation of control towers. The allegations of negligence established below are directed solely and exclusively to the ministerial duty in the operation of the tower.[7] Thus, judicial resolution of control tower negligence would not involve issues as to the constitutional or statutory validity of the federal aviation program. In contradistinction to *Dalehite,* the negligent acts relied upon here were those of specific lower echelon operational employees, involving neither their non-negligent performance of specific acts directed by an authorized Government program, nor the exercise of a policy making function. Perhaps the Government's error stems

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[7] *Cf. Worley* v. *United States,* 119 F. Supp. 719, 721 (D. Or., 1952) where in holding the Government liable for injuries caused by negligently set poison coyote traps, the court said "The policy of using these instruments may well have been adopted in the exercise of executive discretion. But the setting of the particular traps under all the circumstances and conditions must be judged according to the standard of what a reasonable man would have done or failed to do." In a footnote the court explained that employees exercising a discretionary function are to be distinguished from "those who perform the authorized function or duty after discretion has been exercised as to whether to undertake it."

from its failure to recognize "the existence of a continuum of possible types of discretionary action ranging from narrow, routine exercises of discretion to high level policy decisions." Note 66 Harv. L. Rev. 488, 490 (1953). As *Dalehite* states, §2680(a) embraces only those types of discretion in the higher ranges of the spectrum performed by those exercising legislative or administrative policy or planning authority. See also *United States* v. *White,* 211 F. 2d 79, 82 (C.C.A. 9, 1954). To what Tigner and his associates did or failed to do, one cannot fairly apply this Court's test that "where there is room for policy judgment and decision there is discretion." [8]

Finally, tower controllers do not "regulate." The Government confuses persons who regulate with those who are regulated. In many areas the Government extensively regulates activities (viz., securities and livestock exchanges, railroads, communication systems, public utilities) which activities are not themselves of a governmental regulatory nature. Obviously the error lies in abuse of the word "regulate." The control tower man does not regulate in a legal sense, for he adopts no rules for general application nor does he create standards. On the contrary, he merely acts at the operational level subject to pre-existing regulations, standards and policy laid down by the statute and its administrators. In this respect the tower controller, whether a C.A.A. employee

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[8] Nor, as the Government argues, is that part of *Dalehite* dealing with alleged negligence of the Coast Guard apposite because it concerned (1) the failure to promulgate regulations for loading and unloading the FGAN from ships, and (2) an alleged failure in fighting fire, a type of activity covered by a well recognized common-law immunity. 346 U.S. at 43. Neither of these assigned reasons for exculpating the Coast Guard is applicable here because the tower control operators were not charged with negligence for failure to adopt regulations at their level of activity, nor is there any classical common-law immunity for the functions they were performing such as there is for fire fighting. On the contrary, were a private airport involved in the same circumstances there is no question but that liability would exist.

or a private employee of a non-federal airport, is a regulatee occupying the same status as many other private employees who are regulated (but do not regulate) under the federal aeronautics program.[9]

In summary, no problem for resolution on certiorari is presented here because (1) in contrast to *Indian Towing*, liability was imposed below for negligence in the conduct of an activity integrally part of private airport operation and of a type which has been and is still being carried on by private persons, (2) the activity is such that, by any standards, it is outside the discretionary realm contemplated by 28 U.S.C. 1346(b), and (3) this case presents no new problem nor any departure from the decision of this Court in *Dalehite*.

Respectfully submitted,

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[9] For example, under federal air regulations a pilot of a commercial airliner is in command of the aircraft and thus authorized to direct and control passengers and crew (14 C.F.R. 61.110); private maintenance staffs of commercial airlines are authorized to inspect and certificate aircraft (14 C.F.R. 61.71 et seq.); private airline dispatchers are authorized to clear aircraft for flight (14 C.F.R. 61.191 et seq.); and private company check pilots are authorized to check the qualifications of pilots (14 C.F.R. 61.134). In each of these instances, just as in the case of control tower operators, private personnel of commercial airlines have the authority and backing of federal regulation to control, supervise or review the activities of other persons subject to federal regulation of air commerce. Yet it would be unthinkable to suggest that that limited authority to perform what are essentially operational functions is a power to "regulate" in the sense that their activities take on a sovereign immunity.